

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MR. JUSTICE K.P.BALACHANDRAN

FRIDAY, THE 29TH JUNE 2007 / 8TH ASHADHA 1929

MFA.No. 259 of 2001(B)

O.P (MV).NO.261/1997 OF MOTOR ACCIDENT CLAIMS TRIBUNAL, OTTAPALAM.

APPELLANT/3RD RESPONDENT:

THE ORIENTAL INSURANCE CO. LTD.
PATTAMBI, NOW REPRESENTED BY ITS
ASSISTANT MANAGER, MOTOR THIRD PARTY CLAIMS CELL,
METRO PALACE, KOCHI-18.

BY ADV. SRI.MATHEWS JACOB (SR.).

RESPONDENTS/PETITIONERS AND RESPONDENTS 1 AND 2:

1. SAINABA, D/O. NABEESA, CHAKKINGAL HOUSE,
CHERPALACHERY, OTTAPALAM TALUK.
2. HAJIRA, D/O. NABEESA, -DO- -DO-.
3. SHAMEENA, D/O. NABEESA (MINOR)
REPRESENTED BY HER GUARDIAN MAMMU,
S/O. UNNALI, CHAKKINGAL HOUSE,
CHERAPLACHERY, OTTAPALAM TALUK.
4. ABOOKER, S/O. NABEESA (MINOR),
REPRESENTED BY HIS GUARDIAN MAMMU,
S/O. UNNALI, -DO- -DO-.
5. T. HAMSA, THAZHATHETHIL HOUSE,
VALLAPUZHA, OTTAPALAM TALUK.

M.F.A. NO. 259/2001:

6. **ABDUL HARIF, S/O. T. HAMSA,
 -DO- -DO-.**

**BY ADV. SRI.E.S.M.KABEER,
 SRI.O.P.NANDAKUMAR,
 SRI.V.A.AJAI KUMAR.**

**THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD
ON 29/06/2007,THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

ORDER ON C.M.P. NO. 2766/2001 IN M.F.A. NO. 259/2001

DISMISSED

SD/- J.B.KOSHY, JUDGE.

29/06/2007.

SD/- K.P. BALACHANDRAN, JUDGE.

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prv.

J.B.Koshy & K.P.Balachandran, JJ.

M.F.A.No. 259 of 2001

JUDGMENT

Koshy, J.

Respondents 1 to 4 filed an application for compensation, claiming an amount of Rs.7,12,700/-, for the death of their mother in a motor accident on 23.9.1996. According to the claimants, the accident occurred due to the negligence of the driver of the vehicle insured by the appellant Insurance Company. The Tribunal awarded only Rs.1,58,500/- as compensation. The contention raised by the Insurance Company is that the driver of the vehicle had no badge and therefore, there is violation of policy conditions and they should be allowed to recover the amount from the insured. In this circumstance, we refer to the three member Bench decision of the Apex Court in **National Insurance Co. Ltd. v. Swaran Singh** (AIR 2004 SC

1531), wherein it is stated that even in the absence of a valid driving licence or disqualification of the driver for driving at the relevant time are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time. Here, the burden is on the Insurance Company to prove that the driver had no valid driving licence. In this case, the driver had a valid driving licence. There is no case for the Insurance Company that absence of badge was the cause of the accident. In any event, no evidence is produced to show that the insured owner was negligent.

2. Paragraphs (iii) to (vi) of the decision in **Swaran Singh's case** (supra) are as follows:

"(iii) The breach of policy condition, e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub section (2)(a)(ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.

(v) The court cannot lay down any criteria as to how said burden would be discharged, inasmuch as the same would depend upon the facts and circumstances of each case.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in

interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149(2) of the Act."

Mere absence of badge was not the cause of the accident and the driver had valid driving licence. Since the Insurance Company did not adduce any evidence to show negligence on the part of the insured, we are of the opinion that the Insurance Company cannot avoid its liability to pay compensation.

Hence, the appeal is dismissed.

(J.B.Koshy, Judge)

29th June, 2007

(K.P.Balachandran, Judge)

tkv

J.B.Koshy & K.P.Balachandran, JJ.

M.F.A.No.259 of 2001

JUDGMENT

29th June, 2007